BEFORE THE ARBITRATOR

In the Matter of a Dispute Between

METROPOLITAN COUNCIL
METRO TRANSIT

BMS Case 14PA0562

and

AMALGAMATED TRANSIT UNION
LOCAL 1005

Appearances:

Mr. Justin Cummins, Esq.; Cummins and Cummins, 1245 International Center, 920 Second Avenue South, Minneapolis, Minnesota 55402, on behalf of Local 1005.

Mr. Andrew Parker, Esq.; Parker Rosen, 888 Colwell Building, 123 North Third Street, Minneapolis, Minnesota 55401, on behalf of Metropolitan Council and Metro Transit.

ARBITRATION AWARD

Pursuant to the 2012-15 collective bargaining agreement between the captioned parties, the parties jointly selected Arbitrator Sharon A. Gallagher to hear and resolve a dispute between them regarding whether supervisors performed bargaining unit work on September 14, 2013. The hearing was originally scheduled for March 20, 2014 but it was postponed to April 28, 2014, all by agreement of the parties.

The hearing was held in Minneapolis, Minnesota on April 28, 2014. The Union called three witnesses (one on Rebuttal) and the Council called two witnesses, all of whom were sworn on oath or affirmation by the Arbitrator. Four Joint Exhibits, one Union Exhibit and five Council Exhibits[1] were admitted into the record. The parties had a full opportunity to argue, make and resist objections and to examine and cross-examine witnesses. No stenographic transcript was taken.

The parties agreed to e-mail their initial post-hearing briefs to each other and to the Arbitrator by close of business on May 16, 2014 and they agreed that if reply briefs were e-mailed, the parties would do so (as above) by close of business on May 23, 2014. The Arbitrator received the reply briefs on May 23, 2014 whereupon the record herein was closed.

ISSUES

The parties were unable to stipulate to the issues for decision herein. However, they agreed that the Arbitrator could frame the issues based on the relevant evidence and argument with consideration of the parties' suggested issues. The Union suggested the following issues:

[1] The Council withdrew ER. Exh. 6.

1) Whether the employer violated Article 3, Section 3 of the contract by having management perform non-emergency maintenance work reserved for bargaining unit members.

2) If so, what is the appropriate remedy?

The Council suggested the following issues for decision:

3) Whether a supervisor clearing the right-of-way to assist the safe movement of an LRV violates the collective bargaining agreement.

4) If so, what is the appropriate remedy?

Based on consideration of the suggestions and the relevant evidence and argument, the Arbitrator finds that the following issues, absent argumentative language included by the parties, fairly present the dispute between the parties and they shall be decided herein:

5) Did the Employer violate Article 3, Section 3 when two Metro Transit managers removed pea gravel from the right-of-way on Saturday, September 14, 2013 for the safe movement of an LRV to be used in ACJV Green Line testing?

6) If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE 3
RECOGNITION AND MAINTENANCE OF MEMBERSHIP

. . .

Section 3. Except as provided herein, no bargaining unit work shall be done by employees who are not members of the ATU. It is understood that training of students and other training procedures will not be deemed bargaining unit work. All training of Operators will be deemed bargaining unit work unless mutually agreed to in writing.

Agreed upon Past Practice: the following is a list of training performed in the Transportation Department by non-ATU members which the ATU Local 1005 and Metro Transit have identified as the current past practice between the parties. This is not intended to be an all inclusive list.

Right to Know Training
Diversity
Random Drug Testing

ARTICLE 4
MANAGEMENT PREROGATIVES

The ATU recognizes that all matters pertaining to the conduct and operation of the business are vested in Metro Transit and agrees that the following matters

> specifically mentioned are a function of the management of the business, including, without intent to exclude things of a similar nature not specified, the type and amount of equipment, machinery and other facilities to be used; the number of employees required on any work in any department; the routes and schedules of its buses; the standard of ability, performance and physical fitness of its employees and rules and regulations requisite to safety. Metro Transit shall not be required to submit such matters to the Board of Arbitration provided by Article 13.
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> . . .

BACKGROUND

The Metro Transit Division (MT or Metro Transit) of the Metropolitan Council (Council) provides bus and train commuter services to customers in the Minneapolis Metro area, an average of 240,000 trips per week. MT has operated the Blue Line (known as the Hiawatha Line), a light rail line, in the Minneapolis metro area since 2004. This line transports passengers on 12 miles of track from the Target Baseball Stadium to the Mall of America with service also to the airport. For approximately the past three to four years the Council has contracted to build ten additional miles of track which will be known as the Green Line.

The Green Line (also a light rail line) will connect with the Blue Line. The Green Line will go through the University of Minnesota campus to St. Paul and end at Union Depot when it is completed. At all times relevant to this case, the Green Line has been under construction and it has been controlled by the Central Corridor Project Office and the third party construction contractors of the Line, not the Council or Metro Transit. As of September 14, 2013, Green Line construction was not completed and the Green Line was not in revenue service for customer use. One of the Green Line contractors is Aldridge Colisys Joint Venture (ACJV). On July 25, 2013, MT's responsibilities regarding the Green Line changed slightly with Metro Transit's issuance of an Operational Notice (10-13) which read in relevant part as follows:

> Starting July 25th, 2013, Metro Transit will be working in coordination with ACJV and the Central Corridor Project Office to begin Integrated Testing along the Green Line.
>
> All Metro Transit employees must attend Green Line Contractor On Track Safety training prior to attending any of the testing.
>
> All Metro Transit Operations and Transportation Department personal (sic) must attend Green Line Physical Characteristic training prior to operating a LRV or attending any of the testing.
>
> The Rail Control Center will maintain movement records for all Metro Transit equipment involved in testing.
>
> . . .

At this point, ACJV began testing of tracks, LRV's switches, lights and all other transportation systems with the MT's assistance but control of the Green Line remained with ACJV. As part of this testing, the Contractors repeatedly requested that Metro Transit transport Light Rail Vehicles (LRV's) to their employees working along the Green Line for them to test the use of vehicles and the safety and effectiveness of Green Line systems, equipment and

operations. This contractor testing is the reason why an LRV was moved 11 miles to the St. Paul OMF on September 14, 2013 which is the situation that gave rise to the instant grievance.

It was not until February 1, 2014 that the Metro Transit took over "the responsibility for the Green Line Corridor" and its Rail Control Center (RCC) was then given "control of the physical plant connected with the Corridor" and all Metro Transit employees were advised that the RCC was thenceforth to "be made aware of any access to any structure, or use of the Right of Way" (ER. Exh. 3).[2]

The current Track Maintainer (TM) job description contains the following examples of duties/responsibilities:

- Maintains and repairs tracks, turnouts, at-dash grade crossings, rail lubrication machines, and other mechanical systems on track structure.
- Conducts and records track, turnout and joint inspections.
- Replaces areas of concrete or timber ties, turnouts, and track fastenings.
- Operates small tools and equipment (rail saw, rail drill, and spiking equipment).
- Assists with track surfacing, alignment, and gauging operations.
- Assist in emergency situations.
- Attends safety and training meetings.
- Operates high rail vehicles, small cranes, and other vehicles used with track maintenance inspection and recording.
- Assists with inventory of spare parts to insure parts are available to carry out track maintenance.
- Updates maintenance reporting system; maintains maintenance records as required by Metro Transit.
- Performs snow removal; operates snow removal equipment (self propelled and hand held removal equipment); assists other agencies with removal as required.
- Performs other related duties.

There is no reference in this job description to clearing Rights of Way (ER. Exh. 5).[3]

[2] Right of Way at Metro Transit is defined as 12 feet either side of the center of each track.

[3] It is undisputed that TMs also clear the tracks of debris before they inspect, repair or replace tracks. They sometimes use switch brooms to do this work as well as when they perform snow/ice removal.

Rail Transit Supervisors (RTS) spend about one-half their time in the RCC and one-half their time in their MT-assigned response vehicles. RTS's must "ensure safe and efficient rail operations through monitoring and directing rail movement" and they are expected to act as supervisors in the field over "rail operations and facilities including station platforms, station structures and equipment (ER. Exh. 4). The thirteenth through fifteenth bullet points stating examples of RTS duties read as follows:

- Performs operational evaluations, proficiency tests and emergency drills. Performs inspections of stations, trains, mainline operations, yard operations, and Right of Way property for unsafe and abnormal conditions.

- Directs Train Operators during emergencies, equipment breakdowns and service delays. Authorizes, monitors, coordinates and controls all work on rail property.

- Performs other related duties.

Since at least 2004 when the Blue Line opened, in every RTS's response vehicle, MT stocks a switch broom as standard equipment. These brooms have stiff bristles on one end and a chisel on the other end to clear snow, ice and debris from the flangeways [4] adjacent to the train tracks. Both Light Rail Operations Manager Michael Guse (an Track Maintainer and then an RTS from 2004 to 2012 when he was promoted) and Director of Rail Systems Maintenance Mark Benedict stated that 1) they have been called by bargaining unit employees to remove debris from flangeways and they have done so in the presence of unit employees; 2) that they have radioed on the channel that all MT employees have access to when they enter the ROW to clear debris; and that 3) no grievances have been filed thereon.

Both Benedict and Guse stated that they would never call in or assign a TM to remove debris for the safe passage of trains as TM's do not normally perform this work; only supervisors perform this work. TM's only remove debris as needed before they address a track problem such as inspecting, repairing or realigning or replacing track, track clips, concrete or timber ties, track surfaces, turnouts, grade crossings and machines and systems on track structures. TM's do remove snow from the tracks according to their job descriptions. [5]

FACTS

The facts giving rise to this grievance are not in dispute. On Friday, September 13, 2013, ACJV contacted Manager of Light Rail Operations, Michael Guse to request a Light Rail Vehicle (LRV) be delivered by Metro Transit to the St. Paul maintenance facility (OMF) the next day, Saturday, September 14th. This was an 11 mile trip, the full length of the newly-constructed Green Line and part of the Blue Line. ACJV wanted the LRV delivered on Saturday at a certain time so that ACJV employees (who were scheduled to work after the arrival of the LRV) could perform ACJV work. Guse asked the ACJV whether the track to the destination had been

[4] A "flangeway" is an empty space between the poured concrete deck and the track where the flange wheel goes through to move the train along the track. It is undisputed that debris in the flangeway can cause derailment.

[5] None of the Union's three witnesses have worked as TM's. None of them are employed in that department nor do they directly represent TM's or train operators.

cleared by ACJV employees and whether it was available for the safe movement and delivery of the LRV.[6] ACJV assured Guse the track was clear and available. Guse therefore expected that ACJV employees had made sure the 11 miles of track would be clear of debris and safe for the requested LRV move.

Guse was the employee in charge (EIC) of the September 14th move. Guse assigned two Mechanics, Fetterly and Aszmann, one to drive and the other to act as passenger in the Brandt (a diesel truck used to pull LRV's on Metro Transit track when LRV's need to be moved) on September 14th. Guse also assigned a Train Operator to ride in the LRV that day. These assignments were all standard procedure for such an LRV move. No Truck Maintenance Department employees were assigned to the September 14th Team.

On September 14th, the Brandt pulled the LRV at a speed of from 5 to 10 miles per hour. Mark Aszmann drove the Brandt while Kevin Fetterly operated the radio and maintained communications with EIC Guse and the Operator in the LRV.

During the first portion of the move, Guse was in his Metro Transit street vehicle and in constant contact with the LRV Move Team. Just before the Brandt and LRV reached the Prospect Park Station on the east side of the University of Minnesota campus, it was discovered that there was pea gravel and tar on the road which had been picked up by cars crossing the light rail tracks and deposited in the Right of Way and in the track flangeways. Guse decided this gravel/tar was a safety hazard which had to be removed before the Brandt and the LRV could safely travel further. At this point, Guse stopped the move and he and another manager, Senior Transit Supervisor Schoeb Behlim got out on the tracks with switch brooms and worked to remove all debris from the track flangeways.

Mechanic Fetterly took a photo with his phone of Guse and Behlim performing this work (U. Exh. 1); this work took from 10 to 20 minutes for the two mamagers to complete. Fetterly took the picture because he believed it showed a contract violation, supervisors performing bargaining unit work. [7] Fetterly admitted that on September 14th he never radioed EIC Guse or got out of the Brandt to object to Guse and Behlim's removing the debris.

On September 20, 2013, Union Steward John Hawthorne filed the instant grievance. Union Representative Dave Rogers, not Hawthorne, normally represents Track Maintainers. Hawthorne, who is employed as an Electro Mechanic at the St. Paul train yard, does not interact with Track Maintainers and he works in the yard, not on the line. The grievance (Jt. Exh. 2) alleged a violation of Article 3, Section 3 and sought 8 hours' overtime pay for three Track Department employees as a remedy for the pictured managers performing debris removal on September 14th. [8]

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[6] On Saturday, September 14th, Guse reconfirmed with ACJV that the track was clear and available. ACJV again confirmed that it was. It is undisputed that ACJV's report to Guse was in error.

[7] Fetterly has never worked as a Track Maintainer. Fetterly asserted herein that he had never seen managers doing this kind of work in his 14 years as a Mechanic at Metro Transit. Although Fetterly stated that he has spent 95% of his time as an MT employee on or near the rails, he corrected this testimony on cross to say that his work around the rails has mainly been in the yard, not on the line.

[8] It is undisputed that the third person in Fetterly's photo, Eric Anderson was a Minnesota DOT employee not employed by MT and that Anderson did not perform any work on September 14th.

The Step One denial issued on October 16, 2013, and on November 8, 2013, MT issued its Second Step denial. Thereafter, the grievance was brought forth for arbitration before the Undersigned.

POSITIONS OF THE PARTIES

Union

The Union argued that the language of Article 3, Section 3 is a clear and unambiguous work preservation clause that must be enforced by the Arbitrator because exceptions stated in Article 3, Section 3 are inapplicable. Furthermore, the job description for Track Maintainer includes the maintenance of tracks, and grade crossings, track inspection and related duties, which work Union witnesses Fetterly and Hawthorne stated was involved here and they have seen Track Maintainers regularly perform for years.

On September 14th Fetterly took pictures of supervisors performing Track Maintainer work in a non-emergency situation on track that was not yet in service to the public. Metro Transit never notified the Union of its actions that day and the Union had no knowledge that Metro Transit supervisors had been performing this unit work before September 14th as Metro Transit has claimed. In these circumstances, the Arbitrator must reject the Employer's evidence of an alleged past practice that contradicts the clear language of Article 3, Section 3.

If the Arbitrator were to rule in favor of Metro Transit in this case, she would essentially have to rewrite the contract to abrogate clear employee rights and grant Metro Transit the unlimited means to flout the parties' intent and the manifest purpose of Article 3, Section 3. Here, Metro Transit undisputedly assigned unit work to its supervisors on September 14th in contravention of its plain obligations under the labor agreement. In addition, the Union noted that the contract's management rights clause does not permit Metro Transit to ignore the mandatory language of Article 3, Section 3. And Article 3, Section 2 also requires Metro Transit to recognize the Union as the sole collective bargaining agent of the unit employees involved. This clause is another reason to sustain the grievance.

The prior arbitration award submitted by the Employer is factually distinguishable and actually supports the Union's case. In this case, unlike the prior case, no bargaining history supports MT's assertions and no federal regulation or law support MT's assignments to supervisors. Finally, the circumstances of the supervisors doing unit work were quite different in the two cases.

The Union resisted the Employer's argument that its supervisory job description covers the work involved, requiring dismissal of the grievance. In this regard, the Union observed that the fact that the supervisor job description appears to cover the work at issue means nothing as Metro Transit does not negotiate regarding managerial job descriptions. In addition, the Union pointed out that the supervisory job description also lists the operation of light rail vehicles in emergencies as supervisory duties which is, again, contrary to the clear language of another section of the labor agreement.

In any event, even if MT has proved that a relevant past practice exists (which the Union argued it did not), the clear language of Article 3, Section 3 must control and the grievance must

be sustained. The Union requested a cease and desist order, a make-whole remedy and that the Arbitrator retain jurisdiction of the remedy for 90 days.

On reply, the Union argued that MT has made a distinction without a difference by asserting that clearing the ROW is different from the performance of track and grade crossing maintenance: The latter often requires the former and the latter is included in the TM job description. The Union urged that a ruling for MT would allow supervisors to clear garbage and cut vegetation from the ROW. As this work is clearly bargaining unit work, the Arbitrator should avoid such a result.

The Union asserted that MT's past practice arguments must fail because the Union never knew of the alleged practice and never agreed to it. The fact that some bargaining unit members may have acquiesced in the "practice" cannot establish it as a true and binding past practice. Finally, the Union contended that the fact that the Union has not complained about supervisors doing debris removal before this case should not foreclose a ruling for the Union. Here, where the contract language is clear, the failure to protest a prior violation cannot bar a future complaint insisting upon future compliance.

Metro Transit

Metro Transit urged that this case is not about Article 3, Section 3 or any exceptions listed therein. It is about the work performed on September 14th, the clearing of debris from the right-of-way (ROW) to allow safe movement of the LRV and whether that work was bargaining unit work exclusively reserved to unit employees. In this regard, MT noted that historically the work of clearing debris from the ROW has only occasionally and incidentally been performed by Track Maintainers when they are repairing or laying track. But MT supervisors have done this work consistently since the Blue Line opened in 2004 in the specific circumstances here – to assure the safe movement of LRV's. MT further observed that the Union failed to meet its burden of proof to show that this work was traditionally and exclusively bargaining unit work. MT asserted that the testimony of onlookers (not Track Maintainers) regarding snow removal by Track Maintainers was not only insufficient to meet the burden of proof herein but concerned different work.

MT contended that the job descriptions of the Track Maintainer (TM) and the Transit Supervisors support its arguments herein. MT noted that nowhere in the TM job description does it mention clearing the ROW or performing work in the flangeway or on the concrete deck – TMs repair and maintain rails, the ties and spikes. In contrast, the supervisor's job description includes inspection of the ROW for safety as a primary function. At most, TMs incidentally clear ROWs while repairing and maintaining the tracks. The fact that only clearing snow is listed as a primary function in the TM job description further supports the Employer's arguments on this point.

MT asserted that its evidence of past practice, that supervisors have cleared debris from the ROW for safe passage of LRVs for many years, was not seriously disputed by the Union. Gusey and Benedict's in-depth and personal examples of having performed this work or assigned only other supervisors (never TMs) to do it was met by the Union's three witnesses' blanket assertions they had never seen supervisors perform this work before September 14th. The Union

witnesses' testimony was unreliable as none of them worked in positions where they would have seen debris removal. And snow removal by TMs is simply different work, not involved in this case.

MT asserted that they Union did not call the TMs/Operators' Union representative, Dave Rogers, and it called no operators because those witnesses would have contradicted the three who testified for the Union. MT further pointed out that it is undisputed that unit employees most often called supervisors to remove debris from the ROW over the open radio channel and unit employees then stop, watch and wait for supervisors to come and complete the removal. Clearly, the Union has been aware of the practice of supervisors clearing debris from the ROW for years. However, in MT's view, Union knowledge is not in issue here because MT has not claimed a waiver by laches or acquiescence here.

MT argued that no evidence was submitted to show any unit employees were displaced or lost assigned or scheduled work by the two supervisors here performing 10 to 15 minutes of work clearing the ROW on September 14th. Also, the uncontradicted evidence showed that all supervisors are issued switch brooms in their vehicles precisely for the purpose of clearing debris from the ROW. This evidence or lack thereof further supported MT's assertions.

MT argued at length that were the Arbitrator to rule in favor of the Union in this case, she would seriously impact customer service, on-time performance and the efficiency of MT's operations. Ultimately, what would have to occur is that MT would have to hire additional TMs to ride each train in order to avoid delays in travel for customers due to debris removal. This would be extremely inefficient, costly and it would require restructuring of MT's operations. Also, a ruling for the Union would produce absurd results by the Union's admissions, that ACJV employees could clear the ROW but not MT supervisors to assure safe travel of LRVs. Article 4 clearly leaves the determination of the conduct and operation of the business solely to MT. The Arbitrator must not interfere.

MT urged that the Neigh Arbitration Award is a binding precedent. There, the arbitrator construed Article 3, Section 3, the same section involved herein, and found that the work of moving a locomotive in the yard was only incidental to the mechanics' primary functions; that mechanics have not exclusively performed this work but that supervisors have constantly performed this work; that unit employees suffered no loss of scheduled work because a supervisor performed the work; and it would not be economical or practical to always assign a mechanic to do this work. Arbitrator Neigh therefore dismissed the prior grievance and rejected the same arguments made by the Union herein. For all these reasons, MT urged the undersigned to deny and dismiss the grievance in its entirety.

On reply, MT emphasized that Fetterly and Hawthorne were Mechanics who work in the yard and are not in a position to observe track workers on the line; that their testimony only amounted to an assertion that they saw Track Maintainers removing snow form the tracks(not involved herein). MT argued that their testimony should be found unbelievable and unpersuasive.

In any event, MT asserted that the issue is whether TMs have done debris removal exclusively. MT urged that the answer must be no. MT noted that Benedict and Guse's testimony, including specific examples over a long period of time, stood unrefuted that they had

personally done debris removal and that they had assigned same to supervisors. MT contended that the Union's claim that they did not know supervisors were doing this work was unbelievable.

MT asked the Arbitrator to "interpret the term bargaining unit work in the context of this case" (ER Br., p. 3) and reject the Union's argument against admitting and considering past practice as the evidence it proffered simply fleshes out that term. Finally, regarding the Neigh Award, MT asserted that that award applies to this case despite the minor factual differences between that case and this one. There, the arbitrator found that the work involved was not bargaining unit work; that at best, the disputed work was only incidental to the mechanic position and not exclusively done by mechanics because supervisors had done the work for years. MT urged that this case contains these same elements.

DISCUSSION

The meaning of Article 3, Section 3, raised by the Union in its grievance must be dealt with first. Initially, I note that this article is entitled "Recognition and Maintenance of Membership". This title makes no reference to past practice and it does not define bargaining unit work. Indeed, the other sections of Article 3 relate to other topics which can be summarized, as follows:

Section 1: Non-discrimination against Union members.

Section 2: ATU is the exclusive representative of Union employees; the effect on unit seniority of promotions, transfers, demotions, qualifications, abolition or reduction of positions; the obligation to join ATU and maintain ATU membership.

Section 4: Fitness for duty and other physicals.

Section 5: Call-in time and overtime.

Section 6: Lunch and paid breaks.

The Union has argued that the first sentence of Article 3, Section 3 is a clear and unambiguous work preservation clause which must be enforced by this Arbitrator. The problem with this argument is that the first sentence of Section 3 is not the end of it. Rather, Section 3 contains additional language which concerns training and every sentence after the first refers specifically to "training" and "training procedures". In these circumstances, the first sentence of Article 3, Section 3 cannot fairly be read and interpreted in a vacuum as the Union as done in presenting and arguing this case.

The Union argued that the Track Maintainer job description covers the work done on September 14th because that work involved maintenance of tracks and grade crossings and track inspection. However, extensive evidence was submitted to show that MT supervisors and managers have removed debris from flangeways since the Blue Line opened in 2004 in situations where safety was involved. The Union presented no evidence to contradict that of Guse and Benedict on this point. In addition, the fact that MT managers have been issued switch brooms in their MT vehicles to accomplish this work since 2004 also supports MT's argument that this work was not done exclusively by TMs..

It is important that the only mention of debris removal in the TM job description is a specific reference to snow removal. No other kind of debris removal is listed, which under principles of contract construction, could lead one to conclude that other types of debris removal were intended to be excluded. However, as the Union pointed out job descriptions are entirely employer controlled documents so this evidence is not of some but not controlling weight.

However, it is very significant that the situation that Guse had to respond to on Saturday, September 14th was very unusual. ACJV had ordered an LRV to be moved at a time certain so that ACJV employees could thereafter test Green Line track. The track was then under the control of ACJV, not MT, and the Green Line was not open for customer service on September 14th. The LRV move had to be stopped when Guse discovered that pea gravel had gotten into the flangeway and onto the grade crossing. There was no problem with the track on September 14th. Guse had to stop the LRV move immediately, according to MT protocols, to avoid derailment of the LRV. The pea gravel in the flangeway had to be addressed immediately because of scheduled ACJV testing and because derailment could have occurred had it not been removed. Guse had to protect his Move Team.

Clearly, under the RTS job description Guse was within his rights on September 14th to inspect the ROW "for unsafe and abnormal conditions" and to monitor, ensure, and direct safe and efficient rail movements (ER. Exh. 4). The fact that yard employees Fetterly and Hawthorne and Bus Driver Larson had never seen supervisors clearing such debris from a flangeway and grade crossing is not remarkable. None of them ever worked as a TM or Operator so they would not have witnessed supervisors doing this work. But the fact that no one on Guse's September 14th Move Team, including Fetterly, and Aszmann (working in the Brandt) and the Operator (working in the LRV), attempted to stop, assist with or object to Guse and Behlim removing the pea gravel is telling. Finally, no evidence was presented by the Union to contradict Guse's statement (corroborated by Benedict) that he had never assigned a TM to a Move Team. The above evidence supports MT's assertions herein.

The Union has argued that because the first sentence of Article 3, Section 3 is clear, the Arbitrator is prohibited from considering MT's evidence of past practice. This argument must be rejected. In my view, Article 3, Section 3 is ambiguous in that the use of "herein" is not defined as referring to the contract as a whole or just to Article 3. In addition, the fact that the rest of Article 3, Section 3 refers narrowly to training, training procedures and the specifically listed exceptions to Section 3 means that Section 3 is ambiguous with regard to any other subject matter, including what constitutes bargaining unit work.

Given this ambiguity, MT's evidence of past practice is admissible and it becomes relevant to this dispute. In this regard I note that Guse and Benedict both had long tenures as RTS's and as managers and they testified without contradiction that many times they had removed debris from flangeways and crossings as RTS's for safety reasons, that many times unit employees called over the open radio channel for them to do this and witnessed them doing this work and no grievances or complaints were lodged; and that as managers, Guse and Benedict regularly assigned this work to RTS's or did it themselves and that unit employees knew all about it and no grievances or complaints were ever lodged. Even if TMs sometimes performed this work, the record in this case showed that this work was never exclusively TM work. And no evidence was submitted to show that any unit employees lost assigned or scheduled work because of Guse and Behlim's actions on September 14th.

No reasonable explanation was given on this record why no TMs or Operators were called as witnesses and why the Union Representative for TMs and Operators did not even attend the instant hearing. Fetterly, Hawthorne and Larson's testimony regarding the lack of Union knowledge of the debris removal past practice came from three witnesses who could not have been aware of it because none of them ever worked as TMs or Operators and none of them work regularly on the line. Therefore, the generalized testimony of the Union's witnesses (not competent to testify thereon) is simply unpersuasive and insufficient to undermine MTs substantial proof of supervisory debris removal for safety reasons over many years.

Both parties have argued that a ruling in favor of the other would end in various disasters. In answer to the Union's worries let me say that the Award in this case must be and has been limited, by its terms, to the issues posed in the grievance in this case. In all of these circumstances,[9] I find that the Union failed to prove that the contract was violated in this case and I issue the following

AWARD

The Employer did not violate Article 3, Section 3 when two Metro Transit managers removed pea gravel from the right-of-way on Saturday, September 14, 2013 for the safe movement of an LRV to be used in ACJV Green Line testing.

The grievance is therefore denied and dismissed.

Dated at Oshkosh, Wisconsin, this 27th day of May, 2014.

Sharon A. Gallagher, Arbitrator

[9] The last item is whether the Neigh Award controls this case. In my view, the facts, circumstances, and some of the issues involved in the Neigh case were quite different from those in this case. I find that that award is instructive but not controlling here. In this regard, I note that many of the arguments here and the contract language involved are the same as those in the Neigh case.